

Harvell and Collins, P.A., Quarterly Report

1107 Bridges Street
Morehead City, North Carolina 28557

phone 252-726-9050

facsimile 252-727-0055

charvell@harvellandcollins.com

wcollins@harvellandcollins.com

JULY 2008

*It is our pleasure to send you the July Edition of our **NEWSLETTER** for the year 2008.*

*This **NEWSLETTER** will concentrate on various legal concepts and we would suggest that you keep it with your important files to refer to from time to time.*

*For those of you who have not received our **NEWSLETTER** in the past and are new clients, our **NEWSLETTER** attempts to keep you informed of any new developments in local, state, and federal law that might affect your personal life or your business. The **NEWSLETTER** will advise you on these developments and, when appropriate, make suggestions that will help you deal effectively with these changes. Also, the **NEWSLETTER** will serve as a way to communicate with you. As always, if you would like to have us address a particular matter, please feel free to call or write, and we will address that issue in a future **NEWSLETTER**.*

“The Right Advice at the Right Time”
Visit us at www.harvellandcollins.com

If you have not done so already, we encourage you to visit our website. The website serves as yet another way to render superior service to our clients. There is a wealth of information disclosed on the website, including important links to useful government agencies that will assist our clients in obtaining valuable information.

“About the Firm” presents the history and purpose of the law firm. “Staff Profile” introduces our lawyers and legal assistants. Contact information is provided for all employees. The website provides an extensive list of services offered by Harvell and Collins, P.A.

Please visit us at www.harvellandcollins.com. We look forward to comments from our clients regarding our website.

RECENT CHANGES TO THE LAW
ON HEALTH CARE POWERS OF ATTORNEY

For those of you unfamiliar with the Health Care Power of Attorney, a Health Care Power of Attorney is a legal document appointing an attorney or other agent as an individual's "health care agent". The health care agent is then responsible for making decisions regarding the individual's health care should the individual become unable to do so.

The law outlines the types of medical conditions which cause an individual to be deemed incapable of making their own health care decisions. A Health Care Power of Attorney is closely related to, but should not be confused with, an Advance Directive for a Natural Death. An Advance Directive for a Natural Death is also known as a Living Will. A Living Will is a document that allows an individual to outline the types of medical situations in which they desire the withholding or withdrawal of medical care.

In years past, under certain circumstances the provisions of the statutes providing for a Health Care Power of Attorney and a Living Will might conflict with each other. When such a conflict occurred, the provisions in the statute providing for a Living Will were held to control. However, the North Carolina General Assembly passed legislation in August of 2007 that changed the statute on Health Care Powers of Attorney to address these conflicts. Specifically, the amended statute on Health Care Powers of Attorney states that there is no conflict when a Health Care Power of Attorney or a Living Will provides that the Living Will is subject to the decisions of a health care agent. In such cases, the Living Will is subject to decisions of the health care agent.

Some individuals do not have a Living Will but do have a Health Care Power of Attorney specifically granting their health care agent authority to make decisions regarding the withholding or withdrawal of medical treatment. In those cases, the amended statute provides that the health care agent retains authority to make decisions on the administration of medical care. In light of these recent changes, it is important that you review your Health Care Power of Attorney and Living Will, consider your feelings on this important and personal topic, and contact your attorneys at Harvell and Collins, P.A., if you feel any changes to your Health Care Power of Attorney or Living Will are necessary.

RULE AGAINST PERPETUITIES AS APPLIED TO TRUSTS
IN NORTH CAROLINA

What is It? How Can we Avoid It?

The Rule Against Perpetuities has long been a thorn in the side of many estate planning attorneys who draft legal documents granting a future interest in the grantor's property. Often misinterpreted and incorrectly applied, the common law rule states that "no future interest shall serve to pass title to property unless that interest vest or be certain to vest within twenty-one (21) years of some life in being at the date of its creation". Basically, this means you have to know who will

receive the property within the lifetime of someone living at the time of the creation of the property interest, plus twenty-one (21) years. This is problematic because you must figure out what interests are subject to the rule, what conditions create the interests, when they are created. Then, you have to look for that often-elusive 'life in being' in order to ensure that the interests created are valid under the rule. These issues normally can be resolved by choosing someone already living when the interest is created, by keeping the terms simple and straightforward without complex conditions, and by installing default provisions to transfer the property should the original provisions fail.

Of course, due to any number of personal, family, or financial issues, it is often desirable to have complex contingencies in estate planning documents. In addition, sometimes you have estate planning documents which may present a Perpetuities problem due to either poor drafting or unforeseen circumstances which arise many years later. Because it is not always possible to eliminate every issue that may arise with clear drafting, and because it is important to carry out, as closely as possible, the intent of the grantor, the North Carolina legislature adopted the Uniform Statutory Rule Against Perpetuities (North Carolina General Statutes. § 41, Art. 2) in 1995. This statute, called the USRAP, embraces the common law rule that the interest must vest within twenty-one (21) years of a life in being at its creation, and applies to all non-vested interests of any kind, including powers of appointment. The difference is that the USRAP also adds a ninety (90) year wait-and-see period measured from the creation of the interest in the event the interest should be invalidated under the common law rule. This means we wait for ninety (90) years to see if the interest actually vests (an identifiable taker arises who satisfies all the conditions). If such a person arises, the interest is valid.

You might be wondering why we go to all this trouble to even have such seemingly arbitrary limitations on the transfer of a grantor's property. It all dates back to a 17th Century English case in which a wealthy lord with numerous lands and titles created an estate plan fraught with contingencies that sought to pass title to his property among his sons, and other descendants many generations later, upon the happening or non-happening of certain conditions. This led to legal disputes among the lord's sons. The outcome of these disputes was that English courts took the position that provisions seeking to pass property conditionally could not exist indefinitely. It leaves ownership of property uncertain. When there are conditions which extend over several generations involving many pieces of property, you can see where this begins to be problematic.

In addition to those concerns, there is a notion popular in this country that every land owner who takes title to property should be able to use and enjoy the property as they see fit, and should be able to give or sell it to whomever they choose. There is also the idea that the living know better than the dead, how to use and dispose of property. Conditions which may seem reasonable or beneficial at the time they are drafted can be absolutely absurd, prohibitive or impossible to fulfill given changed circumstances two hundred (200) years down the road, or even ten (10) years for that matter.

In August 2007, the North Carolina legislature passed a law entitled “Perpetuities and Suspension of Alienation for Trusts,” N.C. Gen. Stat. § 41-23. This statute expressly repeals the USRAP and the common law Rule Against Perpetuities as it applies to trusts created or administered in the state of North Carolina. It also says that you cannot seek to control disposition of trust property for more than twenty-one years after a life in being at creation of the interest.

This begs the question, ‘Why did the legislature repeal the rule only to adopt it in the same statute?’ The answer is that this statute changes the rule by providing an exception to the rule. As long as a trust contains either a power of sale of trust property in the trustee or a power of termination in one or more identifiable persons, then your trust complies with North Carolina law no matter how you choose to condition the disposition of the trust. § 41-23 does not specify what the power of termination or sale must look like, which suggests that the power may be severely limited or highly conditional. This statute is relatively new and has not been interpreted by North Carolina courts. However, it appears to allow the creator of a trust in North Carolina to exercise much more control over the trust than was previously possible under the USRAP or the common law Rule Against Perpetuities. As always, the lawyers at Harvell and Collins, P.A. remain ready and willing to assist you in planning for your future.

PIERCING THE CORPORATE VEIL: SHIELD YOURSELF FROM LIABILITY

I’m starting my own business, but I’m worried about potential liability. How do I protect myself? Many of you when starting your own business, incorporate and register with the Secretary of State as a corporation, LLC, or other recognized business entity in order to limit liability. While this is absolutely the right thing to do, it is only half of the equation. Merely calling yourself a corporation will not automatically protect you from personal liability for business debts. If you are incorporated, then you must maintain corporate formalities if you wish to avoid a pierce of the corporate veil. Typically, corporate officers and directors are not personally liable to a creditor of the business for its debts. “Piercing the Corporate Veil” is a legal theory that allows a creditor of the business to look beyond the corporate facade, and to recover from the shareholders or directors personally. This only occurs when the officers, shareholders, or directors of the corporation have failed to observe the corporate formalities. The bottom line is, if you want to be treated as a business, then you have to act like one. Here are some things you need to do to avoid a pierce of the corporate veil:

- Draft Articles of Incorporation
- Register with the Secretary of State if required
- Hold a meeting shortly after incorporation
- At that meeting, appoint Officers and Directors and issue stock
- Draft By-Laws to be approved and signed by the Shareholders
- These By-Laws should include, among other things, rights and procedures regarding voting on corporate rules and initiatives

- Conduct Shareholder and Board of Director Meetings annually
- Maintain minutes of those meetings
- **Properly capitalize the Company and keep it properly capitalized throughout its corporate life** (the absence of this factor, perhaps more so than any other, serves as a prima facie case for piercing the corporate veil)
- Keep separate accounts for personal and business expenses. (You cannot use your corporate assets to pay personal bills, to buy your wife a present for your anniversary, or to send your daughter to college)
- Maintain a physical business office separate from your home address
- If you own a business but do odd jobs on the side, do not write checks out of your business account, do not enter into those side jobs under your business name, do not send those customers or clients letters on the corporate letter head.

The list above is not all-inclusive, and every bullet point may not apply to your business. The main thing you want to take away from this list is that you want to keep business and personal separate at all times. If the officers and directors of the corporation are the shareholders and own the corporation in full, then they can still avoid a pierce of the corporate veil as long as they observe the corporate formalities, maintain adequate capitalization, and separate business from personal. Failure to do any one of these three things could open the shareholders up to personal liability. The fact that you are registered as an LLC may not protect you either. While there is no case law directly on this subject in North Carolina, some state courts have allowed a pierce of the corporate veil on an LLC. Because the law is unsettled in North Carolina, the safest course of action is to comply with the corporate formalities. If you act like a business, the courts will treat you like one. If you do not, then you may be exposed to personal liability for business debts.

“Let’s Talk Legal”

Radio Station: WTKF - 107.1 FM

As many of you know, Harvell and Collins, P.A., presents a talk radio program each and every Tuesday at 7:30 a.m. The purpose of the live radio program is to present to the listening audience legal information and allow the listeners to call in and ask questions. We have thus far discussed the following topics:

- Estate Planning
- Elder Law and Medicaid Planning
- Litigation in all Courts
- Estate Administration
- Real Estate Transactions
- Corporate and Business Transactions
- Family Law and Domestic Relations

If you have suggestions for a topic to be discussed, or if you have a question, give us a call. Or, call in during the show at 1-800-818-2255. Please join us on Tuesday mornings, bright and early on the talk station at WTKF - 107.1 FM.

We are now archiving our weekly radio program on the website so that our clients may listen once again to the program by visiting our website at www.harvellingcollins.com.

Postscript

This writing is intended to generally familiarize you with various legal issues. The scope of this document is necessarily limited, and consultation with your attorney or tax advisor should always precede taking any action.